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Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary General

The Secretary-General has the honour to transmit to the General Assembly the report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, submitted pursuant to Human Rights Council resolution 11/5.

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Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

In his initial report to the Human Rights Council (A/HRC/11/10), the independent expert observed that although the debate concerning the responsibility for sovereign debt incurred in questionable circumstances has a long history, it has, since the Monterrey Consensus, assumed a prominent place in discussions regarding the just, equitable and sustainable resolution of the debt problem of developing countries. In particular, the recognition in the Monterrey Consensus that creditor and debtor countries are both equally responsible for preventing and resolving unsustainable debt situations, has opened up the debate on the issue of creditor co-responsibility for what is termed "illegitimate debt". In the present report, which is submitted pursuant to Human Rights Council resolution 11/5, the independent expert highlights the relevance of the concept of illegitimate debt to global efforts to find a fair and durable solution to the debt crisis. The report argues that human rights considerations must form part of the efforts towards the formulation of the concept of illegitimate debt in precise terms.

The present report contains five sections. Section I introduces the report. Section II sketches the activities undertaken by the independent expert since the submission of his initial report to the General Assembly in 2008. The substantive part of the report, section III, reviews the various definitions of illegitimate debt set forth by debt relief campaigners and others, and proposes that the human rights principles of participation, inclusion, transparency, accountability, the rule of law, equality and non-discrimination may provide invaluable guidance in efforts to formulate an internationally accepted definition of illegitimate debt. The section also argues that national audits of debt/lending portfolios and international debt arbitration are all potentially useful tools in addressing the problem of illegitimate debt. Section IV briefly draws attention to the limitations of the current debt relief initiatives and calls for urgent and concerted efforts at the international level towards reform of the global financial system.

The report concludes with a number of recommendations, including calls for all States to support efforts to find a precise and meaningful definition of the concept of illegitimate debt, to establish an international independent arbitration mechanism on debt and to reform the international financial system.

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I. Introduction

1. The independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights submitted his initial reports to the General Assembly (A/63/289) at its sixty-third session and to the Human Rights Council (A/HRC/11/10) at its eleventh session in accordance with the mandate set out in Council resolution 7/4 of 27 March 2008. In its resolution 11/5, the Council welcomed the report of the independent expert and requested him to submit reports to the Council and to the General Assembly on the implementation of the resolution. The present report is submitted in accordance with Council resolution 11/5.

2. In his report to the General Assembly (A/63/289), the independent expert outlined his vision and plan of implementation for the mandate. In his report to the Council (A/HRC/11/10), the independent expert proposed a preliminary conceptual framework for understanding the connection between foreign debt and human rights, based on international legal standards. He also indicated his intention to examine, inter alia, the issues of creditor co-responsibility and illegitimate debt during the period 2009-2010 (paras. 87-90). The present report briefly discusses the concept of illegitimate debt in a modest attempt to draw attention to the relevance of the concept to efforts to find a just, equitable and durable solution to the debt crisis, as well as to advance the debate on the concept.

II. Activities undertaken

3. Since he submitted his initial report to the General Assembly (A/63/289) in October 2008, the independent expert has participated in various meetings and has held consultations with a wide range of stakeholders. Between October and December 2008, these included consultations with the World Bank, the International Monetary Fund, the Inter-American Development Bank and non-governmental organizations in Washington, D.C., participation in a conference on the theme "Debt relief and beyond", organized by the World Bank in Washington, D.C., and a seminar at the Commonwealth Secretariat in London to mark the sixtieth anniversary of the Universal Declaration of Human Rights, along with the special rapporteurs on freedom of religion or belief (Asma Jahangir) and on the right to food (Olivier De Schutter). During the visit to the Commonwealth Secretariat, he and his fellow special procedures mandate holders also met with the Commonwealth Secretary-General, Kamalesh Sharma, to discuss collaboration between the United Nations special procedures and the Commonwealth Secretariat in the promotion and protection of human rights.

4. In its resolution 7/4, the Council requested the independent expert "to contribute, as appropriate, to the process entrusted with the follow-up to the International Conference on Financing for Development, with a view to bringing to its attention the broad scope of his/her mandate" (para. 4).[1] In accordance with the request, the independent expert attended the Follow-up International Conference on

[1] The Council also requested the Secretary-General to facilitate the independent expert's participation in and contribution to the follow-up process of the International Conference on Financing for Development (para. 7).

Financing for Development to Review the Implementation of the Monterrey Consensus held in Doha from 29 November to 2 December 2008 and participated in parallel events organized for non-governmental organizations. Regrettably, he was not afforded a sufficient opportunity to draw the attention of the Conference to the broad scope of his mandate as called for in Council resolution 7/4, his role having been confined to a brief intervention from the floor at the Conference round table on external debt. He further regrets to report that human rights received marginal attention in the discussions and in the outcome document. In his estimation, the international community missed a crucial opportunity to reform the international framework on debt.

5. Between January and July 2009, the independent expert participated in various meetings, including a seminar on the draft guiding principles on extreme poverty and human rights, organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva; the tenth special session of the Human Rights Council, on the impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights; the annual meeting of special procedures mandate holders organized by OHCHR; and the International Conference on a Fair and Transparent Arbitration Mechanism on Illegitimate and Odious Debts, organized by the African Forum and Network on Debt and Development held in Johannesburg, South Africa, on 30 and 31 March, at which he spoke about the challenges and opportunities relating to the establishment of a debt arbitration mechanism under the auspices of the United Nations. On 4 June, he participated in a panel discussion on the theme "Southern countries: foreign debt versus human rights: means of identifying and cancelling illegitimate debts", organized by Centre Europe-tiers monde and Comité pour l'annulation de la dette du tiers monde (Committee for the Abolition of Third World Debt) as a side event during the eleventh session of the Human Rights Council. On 11 June, he participated in a conference held in Rome on sovereign, democratic and responsible finance, which was organized by the Campaign for Reform of the World Bank and at which he spoke on the ad hoc nature of the current responses to the debt crisis and the implications of the financial crisis for human rights and a future debt crisis. On 4 July, he participated in an expert meeting on the impact of the economic, social and cultural rights special procedures on human rights protection, organized by the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights and by the Friedrich Ebert Foundation.

6. In addition, the independent expert undertook his first country missions to Norway (28-30 April 2009) and Ecuador (2-8 May 2009) at the invitation of those Governments. The main objective of the missions was to examine the unique roles of those countries in the debate concerning illegitimate debt and to consider the effect, on the enjoyment of human rights, of recent decisions by both countries in relation to public debt, from the creditor and debtor perspectives. During his visits to the two countries, the independent expert met with a variety of stakeholders, including senior Government officials, civil society organizations, parliamentarians (Ecuador), representatives of international financial institutions (Ecuador), representatives of development agencies (Ecuador), and academics. He will submit reports on the missions to the Council at its fourteenth session next year.

7. In Council resolution 7/4, the independent expert was requested to seek the views and suggestions of States, international organizations, United Nations

agencies, funds and programmes, regional economic commissions, international and regional financial institutions and non-governmental organizations on the draft general guidelines with a view to improving it, as appropriate, and to present updated draft general guidelines to the Council in 2010. The guidelines are designed to be followed by States and by private and public, national and international financial institutions in the decision-making on and execution of debt repayments and structural reform policies, including those arising from debt relief. In his report to the General Assembly (A/63/289), the independent expert expressed his belief that in order to enhance the acceptability of the guidelines and the prospects for their effective implementation it was essential to ensure the fullest possible participation of all stakeholders in their development. In this regard, he indicated a desire to convene multi-stakeholder regional consultations on the guidelines. In its resolution 11/5 (para. 3), the Council called upon OHCHR to assist the independent expert in the organization and holding of regional consultations on the guidelines, including through the allocation of sufficient budgetary resources. Regrettably, no budgetary resources have been allocated to enable him to commence preparations for the regional consultations. The independent expert hopes that the necessary resources will be made available as soon as possible.

III. Illegitimate debt

8. Under international law, successor Governments assume the international rights, capacities and obligations of their predecessors, irrespective of the nature of the former regime.[2] Nevertheless, there are historical precedents when this principle has been challenged and wholly or partially set aside, notably through invocation of the odious debt doctrine.[3] For example, after the Spanish-American War of 1898, the United States contended that neither Cuba nor the United States should be held responsible for the debt incurred by the Spanish colonial Government in Cuba if it had been contracted without the consent of the Cuban people and had not been used for their benefit. Although Spain never accepted this argument, it assumed responsibility for the Cuban debt under the Treaty of Paris, signed between the United States and Spain on 10 December 1898. In the Tinoco Arbitration of 1923, the arbitrator, United States Supreme Court Chief Justice, William Taft, ruled that credits knowingly extended to a country for a dictator who used the money for his personal purposes should not be recoverable. More recently, the doctrine has been invoked to support demands for debt cancellation in Rwanda, Iraq and Nigeria. In 1998, the British House of Commons International Development Committee invoked the odious debt concept to recommend cancellation of Rwanda's debt:

[2] D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 369.

[3] As originally articulated by the legal scholar, Alexander Sack, in his seminal 1927 work, *The Effects of State Transformations on Their Public Debts and Other Financial Obligations*, a debt was presumed to be odious if it fulfilled three essential conditions simultaneously: (a) it was contracted by a despotic regime; (b) it was not used for the needs of the population of the borrower State; and (c) the creditor was aware of the nefarious use of the funds. A 2007 United Nations Conference on Trade and Development (UNCTAD) discussion paper authored by Robert Howse identifies 12 instances in which the odious debt doctrine had been invoked. In none of the cases was a claim rejected on the grounds that no such doctrine existed under international law. See R. Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD discussion paper No. 185 (Geneva, UNCTAD, 2007).

"[t]he bulk of Rwanda's external debt was incurred by the genocidal regime which preceded the present administration ... Some would argue that loans were used by the genocidal regime to purchase weapons and that the current administration and, ultimately, the people of Rwanda, should not have to repay these 'odious' debts ... We further recommend that the Government urge all bilateral creditors, in particular France, to cancel the debt incurred by the previous regime".[4] In 2003, following its invasion of Iraq, the United States called for the cancellation of Iraq's debt on the grounds that it was odious, but this argument was later abandoned to avoid setting a precedent.[5] In 2005, the Nigerian Parliament asked the country's Government to repudiate a debt that had largely been inherited from the military dictatorships, particularly under Sani Abacha (1993-1998). However, the Government opted to negotiate with the Paris Club and was granted a 60 per cent reduction of its debt in exchange for an advance payment of the remaining 40 per cent (approximately $12 billion).[5]

9. In recent years, debt relief campaigners have increasingly invoked the more expansive, albeit controversial, concept of illegitimate debt as a rationale for sovereign debt repudiation or cancellation.[6] They contend that a substantial portion of poor country debt, estimated at more than $500 billion,[7] is illegitimate and should not be repaid. Section III reviews some of the definitions of the concept that have been proposed by the international debt relief movement and highlights the relevance of the concept to global efforts to find a fair and durable solution to the debt crisis, as well as the need for such efforts to incorporate a human rights perspective in order to assure an equitable and sustainable solution. Owing to limitations of space, the discussion is brief and highlights only the key aspects.

A. Definition of illegitimate debt

10. The term illegitimate debt has no formal definition in law and although various attempts have been made to define the term, there is no consensus on its precise meaning.[8] To date, illegitimate debt has been used to describe a variety of questionable debts.

11. The Tegucigalpa Declaration, adopted by the Latin American and Caribbean Jubilee 2000 Platform on 27 January 1999 uses the term illegitimate debt to refer to debt "contracted by dictatorships, Governments not elected by the people, as well as by Governments which were formally democratic, but corrupt"[9] and loans used

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[4] House of Commons International Development Committee, *Debt Relief*, 3rd report 1997-1998 (London: House of Commons) paras. 11, 57.

[5] Comité pour l'annulation de la dette du tiers monde, "Ecuador at the cross-roads", August 2007.

[6] The concept of illegitimate debt is a more expansive one than that of odious debt and is commonly used to refer to odious debt as well as any debt that is not sanctioned by law; debt that is unfair or objectionable; or debt that infringes on public policy. See New Economics Foundation, *Odious Lending: Debt Relief as if Morals Mattered* (London, New Economics Foundation, 2005). See also Jubilee USA Network, "Recent Developments on Odious & Illegitimate Debt", Briefing Note 5, April 2008.

[7] See D. Millet and E. Toussaint, "Figures relating to the debt for 2009", Committee for the Abolition of Third World Debt, 2009. See also J. Hanlon, "'Illegitimate' loans: lenders, not borrowers, are responsible", *Third World Quarterly*, vol. 27, No. 2 (2006), pp. 211-226.

[8] Howse, *The Concept of Odious Debt* (see footnote 3).

[9] See http://www.jubileesouth.org/news/EpKlpEAFyZxSKvhj.shtm.

against the interests of the people who are now required to repay them. It also uses the term to describe debt that swelled as a result of interest rates and negotiating conditions imposed by creditor countries and banks, who persistently and outrageously denied debtor countries the right of association, while the creditor groups joined together in veritable creditor syndicates (Paris Club, Management Committee), backed by the economic coercion of the International Monetary Fund and the World Bank.[9] The Declaration further calls for the cancellation of "immoral debt", namely, debt whose payment threatens the survival of present and future generations.

12. In 2000, the Canadian Ecumenical Jubilee Initiative posited the moral argument: "Repayment of the debt leads to serious deprivation which threatens the cohesion of the community. In such a situation, the debt is illegitimate. The justice of a contract may not be guaranteed if the relationship between the parties is too unequal. Similarly, a contract may not be legally binding if it endangers the health or the life of one of the parties. Ending a contract, or in this case cancelling or repudiating a debt, can be a moral response to what would be an immoral or illegitimate situation, should it continue."[10] The Initiative proposed a four-part definition of illegitimate debt, which included debts that are illegitimate to repay (namely, debts that cannot be serviced without causing harm to the population); debts incurred by illegitimate debtors and creditors acting illegitimately (e.g., debt incurred to prop up a suppressive regime); debts incurred for illegitimate uses (e.g., debts for projects that did not benefit the people in the manner they were intended or debts contracted for fraudulent purposes); and debts incurred through illegitimate terms (e.g., debt incurred with usurious interest rates).[10] In recent years, the Initiative has used the term illegitimate debt to question the legitimacy of the international financial system, which, it contends, is based on exploitation and should be changed.

13. The Latin-American Parliament has proposed four grounds for illegitimate debt: (a) the origin of the debt, given that in many cases they have been irregularly contracted; (b) where the creditor unilaterally increases interest rates; (c) the Brady Plan agreements,[11] which forced the Governments of indebted countries to renegotiate debts with implicit and forced recognition of illegitimate debts; and (d) the co-opting of Government negotiators, who sign the agreements and subsequently assume posts in the financial institutions that benefit from these agreements.[12]

14. According to the European Network on Debt and Development, illegitimate debts are: "[T]hose debts which did not benefit the populations of developing countries. This may be because the loan was contracted by a despotic power which

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[10] Canadian Ecumenical Jubilee Initiative, "Illegitimate debt: definitions and strategies for repudiation and cancellation", Policy Forum, Wycliffe College, Toronto, Canada, 15 and 16 November 2000.

[11] The Brady Plan (named after the United States Secretary of the Treasury, Nicholas F. Brady) was initiated in March 1989, ostensibly to address the debt crisis of the 1980s. The Plan offered an exchange of commercial bank claims for bonds guaranteed by the United States Treasury, on condition that the creditor banks reduced their claims and put the money back in circulation. For their part, the beneficiary countries undertook to consolidate part of their debt and implement International Monetary Fund structural adjustment programmes.

[12] See P. P. Frere, "Illegitimate debts, debt relief and citizen audits" in, *Upheaval in the Backyard: Illegitimate Debts and Human Rights: the Case of Ecuador-Norway* (2002).

then stole the cash, used it to build-up their military capabilities or to oppress the people, or because the loan was contracted for ill-conceived and corrupt development projects which failed".[13]

15. In a policy brief issued in 2002, the African Forum and Network on Debt and Development (AFRODAD) stated that illegitimate debts included debts contracted by dictatorships or repressive regimes and used to strengthen the hold of those regimes; debts contracted by corrupt Governments, which were stolen by senior public officials; debts used for improperly designed projects and programmes; debts that swelled as a result of high interest rates and other conditions imposed by lenders; and debts which could not be serviced without impoverishing a country's people.[14] In a subsequent paper, AFRODAD asserted that illegitimate debts can simply be classified as "debt incurred by illegitimate debtors and creditors acting illegitimately".[15] Thus, "illegitimate debt includes odious debts, loans secured through corruption, usurious loans, and certain debts incurred under inappropriate structural adjustment conditions".[15]

16. The Jubilee USA Network has identified the following as categories of illegitimate debt: loans that were given irresponsibly (e.g., when oil prices increased dramatically in the early 1970s, banks found themselves with large amounts of "petrodollars" and they pushed loans on developing countries in an attempt to have the "petrodollars" earn interest); loans given for ideological or political reasons during the cold war, rather than to promote development; and loans given to countries in circumstances where creditors knew the funds would be siphoned off by corrupt Government leaders.[16]

17. Jubilee South defines illegitimate on the basis of the historical context of the debt and argues that people in developing countries should not have to pay for loans that never benefited the population. In addition, it asserts that "debt continues to be used as a tool of domination that ensures easy access by creditor nations and institutions to the resources of the South".[16]

18. The most systematic attempts to define the concept appear to be those by Joseph Hanlon and the New Economics Foundation. According to Hanlon, illegitimate debt is "debt that the borrower cannot be required to pay because the original loan or conditions attached to that loan infringed the law or public policy, or because they were unfair, improper, or otherwise objectionable. It does not include loans which were legitimate but which the borrower cannot now afford to repay, or which the borrower argues should be set off against other claims".[17] This definition recognizes that the conditions attached to loans, such as excessive interest rates, can have harmful consequences for a borrower country in much the same way that the loan itself might have. After reviewing the dictionary definitions of the word "illegitimate" and the various definitions of illegitimate debt set out in the Tegucigalpa Declaration, the Canadian Ecumenical Jubilee Initiative and AFRODAD,

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[13] See http://www.eurodad.org/aid/?id=114.

[14] AFRODAD, "Fair and transparent arbitration mechanism on debt", Policy Brief No. 1/2002.

[15] AFRODAD, *The Illegitimacy of External Debts: the Case of the Democratic Republic of the Congo* (2005), pp. 11 and 12.

[16] See http://www.jubileeusa.org/de/truth-about-debt/dont-owe-wont-pay/the-concept-of-odious-debt.html.

[17] J. Hanlon, "Defining illegitimate debt and linking its cancellation to economic justice" (Milton Keynes, Open University, 2002), p. 53.

and debt resulting from irresponsible projects that failed to serve development objectives or caused harm to the people or the environment.[23]

21. These definitions indicate that illegitimacy is not narrowly conceived of as a purely legal issue but rather as a broader concept encompassing the ethical, social, political and economic implications of debt. It can be argued that a common thread implicit in most definitions of illegitimate debt is the theme of injustice, seen in the definitions outlined above, which use terms such as "corruption", "oppress", "tool of domination", "unfair" and "usurious". Illegitimate debt impedes the realization of human rights due to improper actions on the part of the lender, borrower, or both. The negative impacts cut across all sectors but are particularly profound in relation to the provision of basic services in the areas of health, education, housing, water and sanitation.

22. The independent expert is of the view that the various formulations reviewed above offer a reasonable starting point for the definition of illegitimate debt in more precise terms. However, much work needs to be done in order to formulate the concept of illegitimate debt as an internationally accepted legal term with precise criteria. This is important and necessary work that must be undertaken urgently, given that the populations of indebted countries around the world continue to suffer from the negative effects of questionable debt, the servicing of which uses up already scarce resources that are insufficient even for the provision of basic services designed to ensure the well-being of citizens. In this regard, the independent expert notes, with appreciation, that the United Nations Conference on Trade and Development (UNCTAD) has recently begun a three-year project on promoting responsible sovereign lending and borrowing, including developing guidelines and criteria for assessing legitimacy of sovereign debt. The main objectives of the project, which is funded by the Government of Norway, are, inter alia, to document best practices on responsible sovereign lending and borrowing; to develop a set of guidelines and criteria for assessing the legitimacy of sovereign debt; and to promote discussion on a structured approach to resolving sovereign debt defaults and disputes. The independent expert strongly supports those efforts and considers that the development of guidelines and criteria must incorporate a human rights perspective if they are to promote responsible lending and borrowing. Consequently, he has initiated a dialogue with UNCTAD to identify areas of collaboration.

B. Concerns surrounding illegitimate debt

23. There are a number of concerns, on the part of both creditors and debtors, relating to the delineation and practical implementation of the concept of illegitimate debt.[24] Section B outlines some of those concerns.

24. First, the broad range of criteria for illegitimacy advanced by non-governmental organizations has led to the observation that the: "Sum of these criteria ... is a very finely-meshed net, in fact it is so finely meshed that it appears

[23] See Government of Norway, *Debt Relief for Development: A Plan of Action* (Oslo, Ministry of Foreign Affairs, 2004) p. 18. See also http://www.jubileeusa.org/truth-about-debt/why-drop-the-debt.html.

[24] For a discussion of the practical/political arguments against granting debt relief on the basis of legitimacy considerations, see Government of Norway, *Debt Relief for Development*, pp. 20-22 (see footnote 23).

to catch all debt. If all these criteria are accepted ... to advocate cancelling 'illegitimate debt' may easily be seen as a recommendation to *cancel all developing countries' debt*. This can hardly be regarded as either appropriate or desirable"[25] (emphasis in original).

25. Second, there is a concern by some that post hoc decisions on illegitimacy of debts might destabilize banking systems.[26] Nevertheless, it has been contended that in domestic legal systems, court decisions on legitimacy are post hoc, thus integrating legitimacy considerations into the due diligence applied to all loans, and banks have no problem with this.[27] Hanlon argues that while lenders would prefer a prior declaration of illegitimacy this would prove difficult in practice because illegitimate regimes usually have the support of at least a major power that would frustrate any attempt to declare its client regime illegitimate.[27] Conversely, he proposes a prior declaration of legitimacy whereby a loan will be considered automatically legitimate if: (a) it has been approved by a national legislative body; and (b) such legislative body has been elected in an internationally recognized election.[27] However, Hanlon's proposal may also prove problematic in situations where no relevant empowering provisions exist in the national law. In such an event, the most feasible option would be a declaration of legitimacy by an international arbitration mechanism on debt.

26. Third, there is some disquiet about the implications of unilateral decisions by indebted countries to repudiate debts that they consider illegitimate. It is argued that such repudiation could have a negative impact on the international credit ratings of the repudiating countries. This would, in turn, reduce the opportunities of those countries to receive loans, as well as their ability to attract foreign investment.[28] Ideally, the decision to deem debt as illegitimate and, most importantly, the assessment leading to such a decision, should be the result of collaborative and transparent efforts between creditors and debtors, with the informed participation of civil society organizations and other relevant stakeholders.

27. Finally, there is an apprehension that creditor acknowledgement of illegitimacy would not only constrain creditors to (unconditionally) cancel the debt in question but could also lead to demands by debtors for reparation for the harm occasioned by the debt. However, it is important to stress that claims of illegitimacy would have to be assessed on a case-by-case basis. In this regard, an international independent debt arbitration mechanism, based on the consent of all parties, would serve as an impartial forum for securing objective rulings.

28. It should be underlined that while the concept of illegitimate debt continues to generate debate, the core issue is that of justice and thus one on which every State, in theory, can find common ground. In this regard, it should be recalled that the Universal Declaration of Human Rights proclaims that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment ... or other lack of

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[25] Government of Norway, *Debt Relief for Development*, p.18 (see footnote 23).

[26] Hanlon, "Illegitimate loans" (see footnote 7).

[27] Ibid, p. 222.

[28] M. Kremer and S. Jayachandran, "Odious debt", *Finance & Development*, vol. 39, No. 2 (2002); Christian Aid, "Enough is enough: the debt repudiation option", January 2007. Christian Aid argues that repudiation comes at a cost and needs to be treated seriously.

livelihood in circumstances beyond his control" (art. 25) and that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (art. 28). Thus, while an assessment as to when debts undermine justice and jeopardize the realization of an adequate standard of living for all may prove a complex undertaking, difficulty is not an excuse for non-action. In all circumstances, the need to ensure justice for all should be upheld.

29. It is also important to underscore that not all debt is bad or illegitimate. Indeed, loans may provide States with the necessary funds to invest in the provision of basic services to the population and therefore assist States in fulfilling their human rights obligations, particularly those relating to economic, social and cultural rights. The existence of illegitimate debt should not be an excuse for poor planning, misuse of funds or failure to fulfil human rights obligations by the Governments of indebted countries. Nevertheless, there are clear cases where Governments are constrained to divert scarce resources from State budgets to repay loans under unjust circumstances. The process of conducting audits on debt/lending portfolios by both creditor and debtors, described below, can be useful in ascertaining the nature of specific loans and deciding on the most appropriate way forward.

C. Relevance of human rights principles

30. As indicated earlier in the present report, the independent expert strongly supports efforts towards elucidation of the concept of illegitimate debt in more precise terms and is of the view that human rights considerations must necessarily form part of such efforts. Human rights language, with the body of international human rights law behind it, is uniquely equipped and indeed, a necessary tool for the adequate development of specific criteria and legally enforceable standards to explain the unjust nature of certain debt. It is worth recalling, in this regard, that the human rights treaty bodies have often urged international financial institutions to pay greater attention to the protection of human rights in their lending policies, credit agreements and debt relief initiatives. For example, in its General Comment No. 2, on article 22 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has indicated that "[i]nternational measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation".[29]

31. It is also notable that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights deem a human rights violation of omission, "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations" (para. 15 (j)).

32. Since illegitimate debt is rooted in the concept of injustice, human rights principles can provide invaluable guidance on how to create a more responsible international financial environment in which the effects of past injustices can be

[29] See also General Comment No. 4, on the right to adequate housing, para. 19; General Comment No. 12, on the right to adequate food, para. 41; General Comment No. 13, on the right to education, para. 60; and General Comment No. 14, on the right to the highest attainable standard of health, para. 64.

sufficiently addressed and the recurrence of illegitimate debt avoided. In particular, the human rights principles of participation, inclusion, transparency, accountability, the rule of law and non-discrimination, which find expression in international human rights law, provide universally recognized standards against which the legitimacy of debt can be assessed.

33. All individuals and communities have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. This includes decision-making processes concerning the negotiation, contraction and use of loans. Participation can be ensured, for instance, through representative national legislative bodies that have been elected through an electoral process deemed free and fair by independent observers. With specific reference to the issue of illegitimacy, debt arising from loans that have been contracted or, after contraction, have been used, without the informed participation of the people through their duly elected representatives, could be considered illegitimate.

34. As the primary duty bearers under international human rights law, States are answerable for the observance of human rights. Thus, they have to comply with the legal norms and standards enshrined in international human rights instruments. If they fail to do so, individuals or groups whose rights are infringed or threatened are entitled to seek redress before the competent bodies in accordance with the rules and procedures provided by law. In the context of debt, accountability entails that creditors should acknowledge the accountability of debtor Governments to their own citizens in the loan negotiation and contraction process and that creditors should avoid linking intrusive policy conditions to loans or debt relief as these may impair the principles of accountability and participation. It also means that the Governments of debtor countries should be open and accountable to their people in the contraction of loans and in the use of borrowed funds.

35. All individuals are equal as human beings and by virtue of their inherent dignity. Thus, no one should suffer discrimination on the basis of such attributes as race, ethnicity, gender, language, social or geographical origin. Further, the principle of non-discrimination requires that States ensure that all measures adopted to fulfil their human rights obligations avoid disproportionate effects and that targeted measures are taken to secure equality of access to basic services for all groups in society, especially the poorest. In the context of foreign debt, non-discrimination can be ensured, for example, by assessing the distributional consequences of loans across society to make certain that the borrowed funds are used equitably to benefit all individuals.

36. In relation to illegitimate debt, many of the definitions of the concept reviewed above include the criteria in which the loan funds were not used for the benefit of the population but rather for the elite in the borrowing country. For example, the Canadian Ecumenical Jubilee Initiative and AFRODAD definitions of illegitimate debt include projects that did not benefit the people as they were intended to do. Such a situation may violate the principle of equality and non-discrimination.

37. The independent expert is of the view that any assessment of the legitimacy of a debt should take into account the activities to be funded, the negotiation of the loan, the terms of the contract and the use of the loan as stipulated in the contract. At each stage, the human rights principles of accountability, participation, inclusion, transparency, accountability and non-discrimination must be upheld by both the lender and the borrower. Thus, the lack of participation, transparency and

accountability in such processes, as well as the lack of accessible redress mechanisms and the exclusion of certain groups in the decision-making concerning the use of borrowed funds should all be factors in assessing the legitimacy, or otherwise, of a debt.

38. It should be noted that the foregoing proposals are offered on a tentative basis and that more research and consultation are needed in order to clarify what mechanisms could be used to ensure adherence to the human rights principles outlined above in the context of negotiations and discussions concerning foreign debt, as well as how those principles may inform the framework for assessment of illegitimate debt. In this regard, the independent expert will continue to explore and consult on these issues.

D. Shared responsibility of creditors and debtors

39. The principle of the shared responsibility of debtors and creditors is at the heart of an equitable global financial system. As underscored in the Monterrey Consensus, "debtors and creditors must share responsibility for preventing and resolving unsustainable debt situations."[30] Responsible lending is required on the part of creditors; responsible borrowing and the use of loans is required on the part of debtors.

40. While the issue of creditor liability and misconduct is at the core of the illegitimacy debate, the independent expert considers that it may be more prudent to conceive of the problem as one of creditor co-responsibility in the spirit of the Monterrey Consensus. It is important, and in keeping with the principle of shared responsibility, that lenders examine the extent to which they have contributed to unsustainable debt burdens in developing countries and acknowledge responsibility for the debt burdens. Where the lender is connected with project design or the loan is linked to the borrower's acceptance of policy advice provided by the lender, the lender has to accept responsibility for debts incurred as a result of poorly designed projects or bad policy prescriptions.

41. The independent expert reiterates the view set out in his report to the Council (A/HRC/11/10) that it is vital to develop, as a key aspect of the shared responsibility of creditors and debtors, generally agreed criteria for the definition and treatment of illegitimate debt. The international community needs to work together to ensure responsible lending and borrowing that benefits the populations of the indebted countries and enhances the capacity of the Governments of such countries not only to invest in the provision of basic services but also to fulfil their human rights obligations. One possible way of achieving this could be through the inclusion of provisions in loan agreements which explicitly respect the national sovereignty and development priorities of borrower countries. Loan agreements could also include clauses concerning the human rights implications of the loan.

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[30] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex, para. 47.

E. Debt audits

42. In recent years, debt audits have been undertaken in a number of countries by Governments and civil society groups. The purpose of the audits has been to ascertain the original terms of loans, how much interest has been paid, what the loan funds were used for, who borrowed the money and in whose name, and the role and identity of the lender.

43. National debt audits are a valuable analytical tool for determining the nature of a country's debt.[31] Audits may be useful for obtaining a comprehensive picture of a country's debt portfolio, assessing the impact of debt on the realization of human rights, ensuring that human rights principles have been upheld, and contributing to the development of an appropriate accountability mechanism and a sound debt management framework.

44. Audits may examine a variety of aspects of the debt. They could be used to examine the legality of the loan and to track the movement and use of funds. Audits may also assess the social and environmental impact of debt, as well as the extent to which the loan contributed to the borrower country's development and was used to fulfil human rights obligations via social spending, for example. Additionally, audits may be conducted to examine the circumstances surrounding the contraction and subsequent use of the loan, examining potentials for illegitimacy. A combination of approaches may be necessary in order to get a full picture of the debt portfolio and of its impact on the realization of human rights and to identify the necessary steps forward. In a similar vein, creditor countries can conduct audits of their lending portfolios in order to examine the basis for claims of illegitimacy and to ensure that past loans are consistent with their development cooperation policies and programmes.

45. A crucial requirement of any type of audit, from a human rights perspective, is open and informed participation by a diverse and representative group of actors throughout the entire process. In keeping with the principle of the shared responsibility of creditors and debtors and in order to enhance the perception of impartiality and the credibility of the results of the audit, it may be useful to include representatives of as many relevant stakeholders as possible in the audit process. In addition, the scope and targets of an audit must be made clear at the outset and the audit process must have a legal basis, so as to not undermine its credibility, while the technical expertise and time required to conduct a thorough analysis should not be underestimated. The results of the audit must also be shared in a timely and transparent manner with the wider public. Further, debt audits should be conducted on a regular basis as part of an institutionalized framework of monitoring and accountability.

46. In order for claims of legitimacy or illegitimacy to be taken seriously and to be accepted by all parties, it is necessary to ensure that all relevant stakeholders participate equitably in the auditing process. The purpose of an audit is to uncover the truth. In regard to the issue of illegitimate debt, audits may provide factual evidence to support claims made by creditors or debtors and, if conducted in a rigorous and transparent manner, may remove the potentially negative impact of

[31] Centre Europe-Tiers monde and Comité pour l'annulation de la dette du tiers monde, "Let's launch an inquiry into the debt: a manual on how to organize audits on third world debt", October 2006, p. 62.

unilateral action by debtors on their opportunities to obtain fresh loans on international markets.

47. It is also important to emphasize that the utility of a debt audit extends beyond ascertaining the nature of a country's debt. Since audits require the participation of a diverse range of actors, they are also a way of holding Governments accountable for their borrowing and resource utilization decisions.[32]

48. The independent expert urges creditors and debtors to undertake and/or support rigorous, transparent examinations of their debt/lending portfolios in order to assess the potential impact of debt on the ability of debtor countries to achieve their development objectives, including the Millennium Development Goals, and to fulfil their human rights obligations.

F. Debt arbitration

49. Over the years, numerous proposals for the establishment of alternative debt-work-out mechanisms, independent of the Bretton Woods institutions and comprising both creditors and debtors, have been made by scholars and commentators. Some of the proposals have drawn inspiration from the United States insolvency regime.[33]

50. In 1998, UNCTAD proposed the creation of an international bankruptcy court.[34] In his report entitled "We the peoples: the role of the United Nations in the twenty-first century" (A/54/2000), former Secretary-General, Kofi Annan proposed "an entirely new approach to handling the debt problem", which included the establishment of "a debt arbitration process to balance the interests of creditors and sovereign debtors and introduce greater discipline into their relations". In 2001 and 2002, Anne Krueger, First Deputy Managing Director of the International Monetary Fund, presented a proposal for a comprehensive sovereign debt restructuring mechanism analogous to domestic insolvency procedures such as the United States bankruptcy regime, but this was abandoned in 2003. In 2005, the first Conference of African Ministers of Economy and Finance called for a new mechanism outside the Paris and London Club frameworks for dealing with Africa's debt problem.[35] It should be noted, however, that none of the proposals was explicitly linked to the issue of illegitimate debt.

51. For its part, the international debt relief movement has promoted the idea of a fair and transparent arbitration process and linked the proposal for a debt arbitration mechanism to the illegitimacy debate.[36]

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[32] Jubilee USA Network, "Recent developments" (see footnote 6).

[33] See, e.g., K. Raffer, "Internationalizing United States municipal insolvency: a fair, equitable and efficient way to overcome a debt overhang", *Chicago Journal of International Law*, vol. 6, No. 1 (2005), p. 363 (Raffer favours an ad hoc arbitration panel established by debtors and creditors); C. G. Paulus and S. T. Kargman, "Reforming the process of sovereign debt restructuring: a proposal for a sovereign debt tribunal", paper presented at the workshop on Debt, finance and emerging issues in financial integration, Financing for Development Office, Department of Economic and Social Affairs of the United Nations Secretariat 8 and 9 April 2008.

[34] UNCTAD, *Trade and Development Report*, 1998 (United Nations publication, Sales No. E.98.II.D.10).

[35] See report of the first Conference of African ministers of economy and finance, 7 May 2005, Dakar (AU/CAMEF/Rpt (1)).

[36] See, e.g., AFRODAD, "Fair and transparent" (see footnote 14).

52. In the independent expert's estimation, an international independent debt arbitration mechanism under the auspices of a neutral, non-lending institution with sufficient global legitimacy — ideally, the United Nations — can help resolve unsustainable debt situations. Based on the principles of equity, transparency, inclusion and participation, the mechanism would help resolve debt repayment difficulties and disputes fairly and efficiently. As has been suggested by debt relief campaigners, the mechanism could also determine claims of illegitimacy of debt and decide on cancellation of such debt in accordance with an internationally recognized definition of the concept of illegitimate debt. It could also assess a country's ability to service its debt without undermining its capacity to invest in the provision of basic services to its citizens.[37] The establishment of such a mechanism would address a critical gap in the international financial system.

53. It is important to underscore that the full participation — in the spirit of the international cooperation envisaged under the Charter of the United Nations — of all relevant actors, including debtors and creditors (both bilateral and multilateral), will be necessary in order to create and implement a mechanism in which the interests of both creditors and debtors would be respected.

IV. Reform of the international financial architecture

A. Existing debt relief mechanisms

54. One of the most problematic aspects of the current multilateral debt relief initiatives is the concept of "debt sustainability", which has been defined by creditors very narrowly according to the ability of debtor countries to repay their debts in terms of their export earnings, irrespective of their other commitments.[38] This prevents governments in many indebted developing countries from meeting the basic needs of their citizens. Debt sustainability analyses also do not take into account the human rights implications of the debt, the role of the lender or the possible illegitimacy of the loans.

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[37] See, e.g., Hanlon, "Defining illegitimate debt", p. 60 (see footnote 17). By way of analogy, all national bankruptcy and insolvency regimes require that people retain an income sufficient to maintain a reasonable standard of living as well as the tools of their trade and, usually, their dwelling. From a human rights perspective, article 25 of the Universal Declaration of Human Rights states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services". This provision is enshrined in legally binding form in article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

[38] According to the International Monetary Fund (IMF), the primary aim of the debt sustainability framework for low-income countries is to guide the borrowing decisions of low-income countries in a way that matches their need for funds with their current and prospective ability to service debt, tailored to their specific circumstances. See IMF, "The debt sustainability framework for low-income countries", October 2007. For a critique of the debt sustainability framework, see A. Caliari, *The New World Bank/IMF Debt Sustainability Framework: A Human Development Assessment* (Brussels, Coopération internationale pour le développement et la solidarité, 2006); European Network on Debt and Development, "Still missing the point: unpacking the new World Bank/IMF debt sustainability framework", September 2005. Available from http://www.eurodad.org/articles/default.aspx?=649; and Government of Norway, *Debt Relief for Development*, pp. 15-18 (see footnote 23). See also New Economics Foundation, *Debt Relief as if People Mattered* (see footnote 20).

55. In his report (A/59/2005) to the High-level meeting on financing for development held in September 2005, former Secretary-General Kofi Annan called for a redefinition of debt sustainability "as the level of debt that allows a country to achieve the Millennium Development Goals and reach 2015 without an increase in debt ratios". The independent expert firmly supports this call but would go further and suggest that any concept of debt sustainability should include an assessment of what minimum expenditure is required to enable a Government to meet its obligations to its citizens, including the provision of basic social services such as health and education.[39] In particular, human rights should be used as a basis for assessing debt sustainability and for the cancellation of all unsustainable debt. Such an approach would consider all indebted countries irrespective of their income and assess the level of debt they could carry without undermining their human rights obligations.

56. An examination of the fulfilment of human rights obligations, particularly with regard to social and economic rights, would provide an extremely useful framework for this approach. Given that these rights are set out within the body of international human rights law, the absence of an internationally accepted definition of illegitimate debt does not prevent analysis of the impact of existing loans on the realization of human rights. Of course, this is not to suggest that debt should be considered unsustainable, or illegitimate, whenever a debtor country is not able to ensure immediately the full enjoyment of all economic, social and cultural rights by everyone without discrimination, as the related human rights obligations require progressive realization of such rights, taking into consideration resource constraints.

57. It is also notable that a number of studies have shown that the current multilateral debt relief initiatives are ineffective. For example, a recent study by Erlassjahr and the Friedrich-Ebert Foundation, which assessed the vulnerability of the 24 since the launch of the Heavily Indebted Poor Countries Initiative, shows that more than half of the heavily indebted poor countries are at risk of entering a new phase of the debt crisis.[40] Given that Initiative was designed to offer a permanent "exit" from unsustainable debt, there is need for an alternative fair and transparent debt-work-out mechanism.

B. International financial system

58. The various types of debt claimed to be illegitimate are not only indicative of a major flaw in the current global financial system — a system that has proved to be in need of urgent reform — they also represent a key source of global inequality. As the independent expert observed in his initial report to the Council (A/HRC/11/10, para. 24), many countries spend more each year on debt service than they do on the basic needs of their people, such as education and health combined.[41]

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[39] It is notable that the report of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus (A/Conf. 202/7) states that "[t]ebt sustainability frameworks should also give due weight to the development needs of debtor countries".

[40] J. Kaiser, I. Knoke and H. Kowsky, *Towards a Renewed Debt Crisis? Risk Profiles of the Poorest Countries in the Light of the Global Economic Slowdown* (Berlin: Erlassjahr/Friedrich-Ebert Foundation, 2009).

[41] See also United Nations, report of the Follow-up International Conference, para. 60 (see footnote 39).

59. The issue of illegitimate debt represents an important, albeit controversial, area of the long-standing issue of the unsustainable indebtedness of low- and middle-income countries, which, in turn, represents just one aspect of the broader issue of an international financial system, which, in its current state, is inequitable, lacks transparency and largely serves the interests of countries that are already wealthy. Consequently, the illegitimate debt issue cannot be satisfactorily resolved without reform of the international financial system. Addressing some of the inequities in the international financial system, such as creditor domination, would to some extent, help establish a more equitable basis upon which solutions to questionable debt could be more effectively resolved.

60. Such reform must be aimed at the creation of a more inclusive system in which power, decision-making and benefits are shared beyond a select group of States. No equitable and sustainable solution to the debt problem can be provided by non-inclusive forums, in which only a handful of States participate. It is therefore important that all States participate in efforts to reform the international financial architecture. In this regard, it is worth recalling that in paragraph 9 of the Monterrey Consensus, States declared their commitment to "promoting national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability and inclusion". As the only inclusive institution with global legitimacy, the United Nations should be at the forefront of efforts to reform the international financial system.

61. There is need for a coordinated and truly global approach towards the development of a framework for responsible financing that incorporates the principles of fairness, mutual accountability and transparency, and enhances the capacity of States to achieve their development goals and fulfil their human rights obligations. Since injustice and discrimination are the main reasons for poverty, a human rights-based approach to development, which emphasizes principles of universality, equality and non-discrimination, participation, inclusion, accountability and the rule of law, must be reaffirmed and guide the process.

62. In order to avert a recurrence of the debt crisis, in general, and the build-up of unsustainable and questionable debt, in particular, it is necessary to create a new lending and borrowing framework based on the mutual responsibilities of creditors and debtors. The independent expert takes this opportunity to draw to the attention of all States the work that he is undertaking concerning the development of a responsible financing framework based on international human rights standards, namely, the draft general guidelines on foreign debt and human rights referred to earlier in the present report. He urges all States to support this work.

C. Alternative sources of international finance

63. Increasing frustration at the lack of equal standing given to all stakeholders in the international financial system, in particular developing countries, and the negative impacts of macro-economic prescriptions attached to loans, are a few of the reasons that developing countries have started to search for alternative sources of financing,[42] rather than rely on traditional multilateral and bilateral lenders. While the independent expert does not propose to offer any views on the viability of

[42] An example of such initiatives is the Banco del Sur.

such alternatives, he encourages the exploration of options through which developing countries may find sources of funding that would respect their sovereignty and national development priorities, as well as support the fulfilment of their human rights obligations. At the same time, the independent expert encourages developing and developed countries to continue to work together to ensure that existing sources of financing contribute to the raising of the standards of living of the people of the borrower countries.

V. Conclusions and recommendations

64. **The issue of illegitimate debt remains controversial, but few can argue against the criteria and principles that promote responsible lending and long-term debt sustainability. Efforts to elucidate the issue of illegitimate debt should be viewed from this perspective. The independent expert stresses that efforts to address the issue of illegitimate debt are tantamount to efforts to ensure justice in relation to loans, and he therefore remains assured that all States will find the pursuit of economic and social justice as a common basis for endeavours to comprehensively address the issue.**

65. **Although the absence of an internationally accepted definition of illegitimate debt has been cited as an obstacle in the efforts to systematically address the illegitimate debt issue at the global level, it is not an insurmountable obstacle and it should not be used as an excuse for not taking immediate action. States can and should examine their own debt/lending portfolios in terms of consistency and coherence with stated development policies and in order to ensure that loans contribute to sustainable development and the enjoyment of human rights in an equitable manner.**

66. **The concept of illegitimate debt is important to the search for an equitable and enduring solution to the debt problem of developing countries since it raises issues relating to the co-responsibility of creditors. Much of the international response to the debt crisis has focused on incompetence and misuse of loan funds by debtor countries and has largely ignored creditor co-responsibility. There is a need to integrate the concept of creditor co-responsibility into global responses to the debt crisis if a fair and enduring solution to the crisis is to be found and a recurrence of questionable debt, however characterized, avoided.**

67. **Human rights principles should underpin the framework to be used to determine whether a debt should be declared illegitimate. Consequently, the independent expert underscores the need for the inclusion of a human rights perspective in the important work of UNCTAD concerning the development of guidelines and criteria for analysing illegitimate debt, and he stands ready to assist in this process.**

68. **In order to tackle the nefarious effects of illegitimate debt and to prevent its recurrence, the current international financial and economic system should be restructured as a matter of urgency. The international community therefore needs to work together to develop a responsible financing framework that incorporates a human rights perspective and upholds the principles of fairness, mutual accountability and transparency, and enhances the capacity of States to, inter alia, fulfil their human rights obligations. In this connection, the**

independent expert will continue work on the development of guidelines to ensure that compliance with the commitments derived from foreign debt do not undermine the obligation of States' towards the realization of all human rights, particularly economic, social and cultural rights.

69. Creditors should scrupulously avoid providing loans for development projects that have not been comprehensively assessed, including in terms of their impact on the human rights of the population of the borrower countries. Such assessments must be undertaken with the full and informed participation of all stakeholders, including the affected communities in the borrower countries. Furthermore, all creditors (including international financial institutions) should ensure that their lending policies and programmes genuinely support the national priorities of borrower countries that have been agreed through democratic and participatory processes and that borrower countries have the liberty to design national policies that would enhance their capacity to achieve their development objectives and to fulfil their human rights obligations.

70. States should consider establishing mechanisms that ensure transparency, accountability and participation during the negotiation and contraction of loans, as well as mechanisms to monitor the spending of borrowed funds in order to guard against the corruption and misuse of funds and to monitor for potential negative impacts on the realization and enjoyment of human rights. Such mechanisms should include avenues for the public to bring concerns to the attention of the authorities and appropriate remedies.

71. Debtor countries should consider conducting debt audits to obtain a comprehensive picture of their debt portfolios and elicit information to assist them in the development of appropriate accountability and debt management frameworks. Likewise, creditor countries should consider conducting audits of their lending portfolios, with a view to objectively determining whether all loans are contracted and used in a manner not only consistent with their national development cooperation policies and universally recognized human right principles but also supportive of the development priorities of the debtor countries.

72. There is an urgent need to expand and deepen existing debt relief initiatives, including by cancelling all debts found to be illegitimate following transparent and rigorous auditing by both creditors and debtors. Such processes must include all stakeholders on an equal basis.

73. In the case of an existing debt whose legitimacy is questioned, the creation of a United Nations-based independent arbitration mechanism, as described above, should be supported by all States, as a fair and impartial body with the authority to determine the illegitimacy of the debt.

74. Finally, the independent expert considers that the current economic and financial crises affords the international community a unique opportunity to reassess the manner in which international economic policy decisions, including those relating to foreign debt, have been taken thus far. A new framework for economic governance that places human rights and people at the centre will not only make reforms of the international financial and economic system more sustainable and resilient to future crises, but will ensure that indebted countries

are afforded the necessary space to make policy choices that serve the interests and needs of their people. Human rights provide a clear and universally recognized framework that can inform the design of a just, equitable and enduring solution to the debt problem that has plagued developing countries for decades and impeded their ability to fulfil their human rights obligations. Human rights principles are also a critical factor in the design of a framework for responsible financing that would, inter alia, ensure that the recurrence of unsustainable levels of debt, as well as the generation of illegitimate debt, are avoided.

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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Trafficking in persons, especially women and children

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, which is submitted pursuant to Human Rights Council resolution 8/12.

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Report of the Special Rapporteur on trafficking in persons, especially women and children

Summary

The present report is submitted to the General Assembly in accordance with Human Rights Council resolution 8/12 and covers the period from 1 October 2008 to 30 September 2009.

The report is divided into four sections. Section I contains the introduction, while section II outlines the activities, including conferences and consultations, undertaken by the Special Rapporteur in the discharge of her mandate during the period under review.

Section III deals with the main thematic focus of the report, namely, the identification and protection of and assistance to victims of trafficking. The section contains case narratives of trafficked victims and a separate examination of applicable standards and practices, including the roles and responsibilities of States and of non-State actors in addressing the situation of victims of trafficking. It focuses on a child-centred approach to children who are victims of trafficking and on issues of protection of and assistance to victims of trafficking, especially those in vulnerable situations, such as refugees, asylum-seekers, returnees and stateless and internally displaced persons.

Section IV contains conclusions and recommendations for effectively identifying, protecting and providing direct assistance to persons victims of trafficking, including a recommendation for the development of operational guidelines, procedures and tools for the identification of such victims, based on existing models developed in particular by United Nations agencies and programmes.

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I. Introduction

1. The present report is the first submitted to the General Assembly by the Special Rapporteur on trafficking in persons, especially in women and children, pursuant to Human Rights Council resolution 8/12. It highlights the activities undertaken by the Special Rapporteur during the period from 1 October 2008 to 30 September 2009, including the three country visits conducted in 2009. The main thematic focus of the report is the identification, protection of and assistance to victims of trafficking.

2. In preparing the report, the Special Rapporteur consulted a wide range of civil society and international organizations working in this field, such as the International Organization for Migration (IOM), the International Labour Organization (ILO), the United Nations Office on Drugs and Crime, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC).

II. Activities of the Special Rapporteur

Participation in conferences and consultations

3. Since her appointment in June 2008 and assumption of duties on 1 August 2008, the Special Rapporteur has actively consulted and cooperated with organizations and bodies relevant to her mandate. From 6 to 10 October 2008, the Special Rapporteur held initial consultations in Geneva with representatives of the Committee on the Rights of the Child, numerous permanent missions, ILO, IOM and non-governmental organizations. She also held a telephone conference with the United Nations Office on Drugs and Crime. In October 2008, the Special Rapporteur circulated a questionnaire in English, French and Spanish to all Member States to gather some baseline information on the problem of human trafficking.

4. Thereafter, the Special Rapporteur participated in a variety of consultations and events, particularly focusing on regional cooperation in Africa. From 8 to 12 November 2008, the Special Rapporteur participated in the forty-fourth ordinary session of the African Commission on Human and Peoples' Rights, taking part in a number of events, including initiating and working alongside other stakeholders on a resolution to combat human trafficking in Africa. She also presented a paper on human rights and human trafficking in Africa at an event of the Network of African National Human Rights Institutions and West African National Human Rights Institutions, hosted in Abuja on 10 November 2008 by the National Human Rights Commission and the Open Society Initiative for West Africa.

5. On 21 and 22 November 2008, the Special Rapporteur participated in a regional consultation on Africa, organized in Nairobi by the Global Alliance Against Trafficking in Women, on building and expanding connections towards promoting the human rights of trafficked and migrant persons in Africa.

6. From 25 to 28 November 2008, she participated in the Third World Congress against Sexual Exploitation of Children and Adolescents in Rio de Janeiro, a gathering of more than 3,000 people from five continents, 300 of whom were adolescents. She acted as moderator of a high-level panel of experts which discussed forms of commercial sexual exploitation and its new scenarios, and

participated in several workshops, including one on the implementation of the human rights-based approach to combating trafficking of children.

7. From 7 to 11 December 2008, the Special Rapporteur held consultations in New York with a wide range of stakeholders relevant to her mandate. She met with the Human Rights Watch team working on trafficking issues and with the Steering Committee of the New York State Anti-Trafficking Coalition. She met a number of stakeholders concerned with the interlinkage between sex work and trafficking, in particular as it relates to the recently increased global attention directed towards combating trafficking in the sex industry. The Special Rapporteur also met with representatives of Equality Now, based in New York, and the Polaris Project, based in Washington, D.C. On 9 and 10 December, she participated in a briefing of experts and in a round table on human trafficking, sexual rights, sex work and health organized by the Public Health Program of the Open Society Initiative, during which she met stakeholders from India, Cambodia, Germany, Brazil, Kyrgyzstan, Poland, Thailand and the United States of America.

8. On 3 and 4 February 2009, the Special Rapporteur participated in a conference on the theme "International migration and human trafficking: maximizing benefits, overcoming challenges", convened by the Commonwealth Parliamentary Association at the Houses of Parliament in London and delivered a keynote speech.

9. On 2 and 3 March, the Special Rapporteur participated in an international conference on the theme "Human trafficking at the crossroads", held in Bahrain. The conference focused on the exercise by public-private partnerships of a leadership role in tackling human trafficking.

10. On 6 March, the Special Rapporteur participated in a panel discussion convened during the fifty-third session of the Commission on the Status of Women, on special procedures of the Human Rights Council and women's rights. The Special Rapporteur addressed non-governmental organizations involved in the work of the Commission and discussed the human rights implications of human trafficking, as well as her mandate and key areas of work. On the same day, the Special Rapporteur participated in a series of events organized by the Coalition Against Trafficking in Women, and attended film shows on trafficking, prostitution and pornography.

11. On 12 March, the Special Rapporteur presented her first annual report to the Human Rights Council at its tenth session (A/HRC/10/16 and Corr.1). The report provided a global perspective to the human trafficking phenomenon, its trends, forms and manifestations, including the challenges relating to lack of coherent and reliable statistical information that captures the various dimensions of the problem, and addressed the scope of her mandate. The report also examined the legal and policy framework for combating human trafficking at the international, regional and national levels and set out the vision, agenda and working methods of the Special Rapporteur for carrying out her mandate. In the report, the Special Rapporteur stressed the importance of comprehensive action to combat human trafficking, based on five Ps (protection, prosecution, punishment, prevention and promotion of international cooperation) and three Rs (redress, rehabilitation and reintegration of victims).

12. On 13 March, the Special Rapporteur participated in a side event held during the tenth session of the Human Rights Council, which was organized jointly with the

Permanent Missions of the Philippines and Germany to the United Nations. At that event, the Special Rapporteur addressed the challenges and the way forward in applying human rights to the fight against human trafficking.

13. From 20 to 23 April, the Special Rapporteur was in London at the invitation of the Mayor of London, Boris Johnson, to participate in the launch of the Mayor's strategy to eradicate violence against women, entitled "The way forward: a call for action to end violence against women". The Special Rapporteur also took part in a round table on preventing human trafficking in relation to the 2012 Olympic Games. The visit also provided the Special Rapporteur an opportunity to become acquainted with a number of non-governmental organizations and service providers for victims of trafficking and violence against women and to interact with police officers working as part of the Operation Maxim Human Trafficking Team, based at New Scotland Yard. Non-governmental organizations met with during the visit included Nia Project and Refuge, Africans Unite against Child Abuse, Poppy Project, Tower Hamlets Women's Aid and The Haven, Whitechapel. The Special Rapporteur was impressed by the political leadership and the very close partnership between government and non-governmental organizations in providing services, support and referrals to victims of violence, including victims of human trafficking.

14. On 13 May, the Special Rapporteur participated in the thematic dialogue of the General Assembly on taking collective action to end human trafficking, which focused on a global plan of action to combat human trafficking. In her presentation, the Special Rapporteur advocated renewed collective action for combating human trafficking through the consideration and adoption of a global plan of action that would increase international cooperation and accountability under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) and become a platform for galvanizing the much-needed political and economic will to fast track regional and national plans of action.

15. As part of the efforts to pursue more collaborative strategies that would effectively combat human trafficking, the Special Rapporteur participated in a joint consultative workshop convened from 24 to 26 June with the Special Rapporteur on the sale of children, child prostitution and child pornography and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, in which relevant United Nations and non-governmental partners also participated. Given the nature of the three mandates and the need to avoid overlap, the consultative workshop discussed methods of work, including possible joint activities, and explored practical tools for collaboration with partners.

16. From 29 June to 3 July, the Special Rapporteur participated in the sixteenth annual meeting of special rapporteurs, representatives, independent experts and chairpersons of working groups of the Human Rights Council, held in Geneva. The meeting addressed a variety of issues of concerns to special rapporteurs, including the effectiveness of the special procedures and common approaches to human rights situations.

Planned activities

17. At the time of writing, the Special Rapporteur plans to participate in a high-level panel at an international conference on violence against women, to be held under the auspices of the Group of Eight in Rome on 9 and 10 September 2009. She

will also attend an international conference on the prevention of modern slavery, to be organized by the Organization for Security and Cooperation in Europe in Vienna on 14 and 15 September 2009.

Country visits

18. In May 2009, the Special Rapporteur made official visits to Belarus and Poland to assess the human rights perspectives of approaches to combating human trafficking in the two neighbouring countries and to explore the cooperative initiatives of both countries in combating and preventing human trafficking. In July, the Special Rapporteur visited Japan.

Belarus

19. At the invitation of the Government, the Special Rapporteur visited Belarus from 18 to 24 May. The Special Rapporteur was very impressed by the political commitment demonstrated at the highest level to combat all forms of human trafficking in Belarus, in cooperation with bordering countries and concerned organizations. She noted some commendable good practices in relation to compensation for victims of human trafficking and the establishment of an international training centre on human trafficking and migration.

20. Nevertheless, there were some areas of concern, including:

(a) The need to provide holistic, reintegrative and rehabilitative assistance to victims of trafficking. The emphasis has been on prosecution which, although important, is not the only solution, hence the importance of protecting the human rights of victims;

(b) The root causes of trafficking were not being sufficiently addressed;

(c) The increase in cases of trafficking of men for purposes of labour exploitation;

(d) The need to ensure that anti-trafficking measures do not violate people's human rights. Special care should be taken to ensure a proper balance of measures that will combat trafficking and protect the human rights of every individual.

Poland

21. At the invitation of the Government, the Special Rapporteur visited Poland from 24 to 29 May. At the end of her visit, the Special Rapporteur noted that the scale of trafficking in persons is not only a serious concern in Poland but has been somewhat aggravated in the past five years by virtue of its joining the European Union and also becoming part of the Schengen area. These developments unarguably helped to transform Poland from being primarily a source country to clearly becoming both a transit and destination country. Endemic forms of trafficking include but are not limited to trafficking for purposes of labour exploitation and of prostitution and other forms of sexual exploitation. The Special Rapporteur noted evidence that the Government of Poland is making good progress in combating human trafficking, working closely with stakeholders and by means of international cooperation, especially with border countries, and closely cooperating

with and assisting non-governmental organizations which provide social services to victims of trafficking.

22. Nevertheless, there were some areas of concern, including:

(a) The lack of a comprehensive and unambiguous definition of trafficking in the criminal law;

(b) The Palermo Protocol is not self-executing and therefore requires that an additional act of legislation be implemented fully in Poland;

(c) Trafficking for purposes of labour exploitation is on the increase;

(d) Judicial proceedings relating to trafficking cases are unduly long and, on the average, last about two years;

(e) Availability and access to social assistance by victims of trafficking, especially in rural areas, are somewhat limited and victims of trafficking do not receive compensation. An award of compensation by the court is an important aspect of redressing loss of earnings, violation of human rights and harm suffered in general.

Japan

23. The Special Rapporteur visited Japan from 12 to 17 July. She observed that Japan is clearly affected as a destination country for many victims of human trafficking. While trafficking for purposes of prostitution and other forms of sexual exploitation constitutes the vast majority of the recorded cases, trafficking for purposes of labour exploitation is also of great concern. The Government of Japan, in recognition of the seriousness of the problem, has embarked upon legislative and administrative reforms which include the promotion of international cooperation with a view to combating human trafficking.

24. Despite these efforts, the Special Rapporteur identified a number of issues of immediate concern, in particular:

(a) The non-ratification of the Palermo Protocol;

(b) The unclear identification procedure which may lead to the misidentification of victims of trafficking;

(c) Inappropriate shelters and lack of comprehensive and multilingual assistance for victims of trafficking, and the lack of access by victims to redress and compensation.

25. The full report of the visits to the three countries, including detailed recommendations, will be submitted in due course to the Human Rights Council.

III. Identification and protection of and assistance to victims of trafficking

A. Case studies: critical areas of concern for victims[1]

Case 1. Testimony of a 19-year-old Filipina migrant worker trafficked for purposes of sex work in Malaysia

26. To help my parents survive poverty, I entertained the idea of working abroad. There was no chance for me to land a job locally, having no college education to speak of. Even college graduates have a hard time locating work.

27. I was recruited by a man named Joseph to work in Malaysia as a band singer, with an offer of a monthly salary of 60,000 pesos (US$ 1,260). I was recruited along with two other girls who also aspired to migrate for work. Joseph transported me in 2006 by ship and we landed in Sandakan, Malaysia, where a man named Harry met us at the port to proceed to Miri. Another Chinese man met us and collected our passports for a chop (seal) to pass through the immigration. We went to Kota Kinabalu after paying a fee. From Miri, we went by plane to Kota Kinabalu. A woman met us at the airport and we took a bus to Kuching.

28. We sang at a club; we worked but did not receive any pay. In fact, we were asked to pay our debt. The cost of travel was charged to us, including the chop fees for the passports; in addition payment was collected from us for power and water bills which were initially promised to be free.

29. When we asked for a new job with higher pay, we were given jobs as guest relation officers (a euphemism for entertainer) in Kalampai, which was illegal. We accepted the jobs because there was no way for us to pay the debts claimed by the woman, and for us to go home for good. We worked hard every night, yet we did not receive any pay for days except for a few Malaysian ringgit to buy shampoo and soap but not enough to buy food. Then we found ourselves eventually sold to various men. At the beginning, we were told that they would not force us to go out with men but later on, we were scolded if we would not go out with them. We suffered also from constant stress as we were periodically checked upon and raided by the Malaysian police. We wanted to run away but could not go because they kept our passports; we were warned that if we dared to go we would be taken to a gangster. One night the police raided a night club I was at. I was able to hide on the terrace near an air-conditioned unit where I hung clothes from the clothesline to cover myself. All of the women except me were taken and arrested. Their passports were confiscated. They were photographed. There were media reporters. My passport was surrendered by our house caretaker who thought that I had been arrested with the other women. I asked for the intervention of the Embassy of the Philippines. In fact, I called up and asked to be rescued but the Embassy just told me that there was no budget. I went to the immigration office in Kuching to get an exit pass. To my surprise, I was detained instead of being issued an exit pass. The officer took my statement of a lost passport and I declared that an agent had

[1] The studies presented are from a pool of case studies received by the Special Rapporteur at her request from stakeholders in July 2009. Two have been used for illustrative purposes, in part because of space limitations and their relevance to the thematic focus of the present report: identification, protection of and assistance to victims.

recruited me from the Philippines. I was not detained for long because my boyfriend who accompanied me paid the officer in exchange for my freedom. Immediately, my boyfriend bought a ticket for my return to the Philippines. Upon arrival in Davao in 2007, I was able to make an affidavit of complaint and produced evidence of illegal recruitment and attendant issues. With the help of the Center for Overseas Workers in Davao, I filed a case against the recruiter, but unfortunately he could not be found.[2]

* * *

30. The Special Rapporteur believes that the above-mentioned testimony demonstrates how easily the search for a better life can end badly. It also shows how closely trafficking of human beings and migration are linked, because often it is difficult economic circumstances that make people consider the option of migration and it is also poverty that makes them vulnerable to becoming victims of trafficking. This case raises issues that speak clearly to the thematic focus of the present report. First, the immigration officer was reluctant to identify her as a victim of human trafficking; second, instead of receiving the protection and assistance she deserved as a victim, she was detained; and third, her boyfriend had to bribe someone to secure her release.

Case 2. Laotian boy trafficked for purposes of forced labour in Thailand

31. Non was a fishing industry trafficker's dream. A strong boy of 17 years of age, he had just arrived in the border town of Savannakhet from his village in southern Laos. He had very little education, could barely read and write, and was supporting his mother and grandmother. Working for a small wage in a sawmill, Non met a young man who offered to take him to a well-paid job in Thailand. Non was told that Thai garment factories offered salaries of around 6,000 baht per month (US$ 170). Non said that he really needed money and because the young man was a fellow Lao, he believed and trusted him. He later admitted that his limited exposure to city life may have caused him to be vulnerable to the deceitfulness of recruiters. He thought it was completely normal to cross the river at night and had no idea it was illegal. When he reached the other side, Non boarded a van that would not open its doors to let him out until it reached the coast of Thailand, several hundred kilometres away. Stepping out of the van, he was immediately led on to a fishing trawler under the watchful eyes of men armed with guns. For two years he lived a hellish routine, working from the early morning into the darkness of night, heaving nets of fish without a rest or break. He ate and slept little on a crowded deck with 40 other men. All of them were beaten on a regular basis. Non recalled that one of the labourers next to him was beaten until he was unconscious. He recalled that he was scared but had to look away, otherwise he would have been beaten too. The boat would dock only once every six months, to replenish supplies. On one of these occasions, after two years of forced servitude, Non noticed that his guards had finally left him alone. He made his move and ran for days through the jungle, afraid that if he went along the highway his captors would find and kill him. Eventually, he broke out of the jungle into the yard of a house. The woman who lived there was tending her garden when the frightened teenager suddenly appeared and begged for her help. Non could tell that she was scared of him but he told her not to be. He told

[2] Testimony received from the Buhay Foundation for Women and the Girl Child, Philippines.

her where he was from, that he had been kidnapped to work on a fishing boat for two years, and that he was hungry, tired and wanted to go home. As he told her his story, she listened, wept and embraced him. With compassion, "Auntie", as Non affectionately calls her, fed him and gave him a bed to sleep in. The next day, Auntie put money in Non's hands and ordered a taxi to take him to the Lao Embassy in Bangkok. From there, before he knew it, he was in a car heading for the border. As he was greeted by World Vision staff at the Lao-Thai border and brought back to his village, there was only one joyful thought that crossed his mind: he was alive and would survive.[3]

* * *

32. This case reinforces the fact that men and boys are trafficked for forced labour and underscores the difficulty of identifying trafficked persons working in an industry which is not primarily viewed as a traditional place of work for trafficked victims.

33. As was rightly observed by Germany in response to the questionnaire circulated by the Special Rapporteur to Member States, a key challenge in human trafficking for purposes of labour exploitation is the identification of victims. For that purpose, Germany considered it essential that awareness be created among institutions and persons which deal with victims of such trafficking and that those institutions and persons should be provided with criteria on how to recognize victims of human trafficking.

B. Identification

34. Traffickers exploit persons who are trapped in conditions of poverty and subordinated by conditions, practices or beliefs, such as gender discrimination, gender violence and armed conflict.[4] The plight of victims, as exposed in the above-mentioned case studies, depicts the often untold hardship, abuse and cruelty that victims suffer, resulting in cumulative violations of their human rights. The proper identification of victims of trafficking is vital in providing the assistance necessary to guarantee full, or at least substantial, recovery from harm suffered and to rehabilitate and reintegrate the victim socially and economically.

35. The Special Rapporteur is concerned that States are not paying adequate attention to issues related to the proper identification and protection of and assistance to victims. Only 24 of the 86 countries respondents to the questionnaire sent to United Nations Member States by the Special Rapporteur in 2008 indicated that those issues were a priority area in the fight against human trafficking. The 24 countries were Austria, Bulgaria, Croatia, Cyprus, the Dominican Republic, Finland, France, Germany, Greece, Guatemala, Honduras, Ireland, Jamaica, Japan, Liechtenstein, Mongolia, Paraguay, Qatar, Slovakia, Slovenia, Switzerland, Thailand, the United States of America and Uzbekistan.

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[3] See World Vision Asia-Pacific, *10 Things You Need to Know about Human Trafficking*, 2009. Available at http://wvasiapacific.org/humantrafficking.

[4] Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and Global Rights, Human Rights Standards for the Treatment of Trafficked Persons (January 1999), p. 4.

36. Many victims of trafficking remain unidentified or misidentified by the authorities carrying out the screening processes. Overall, less than 30 per cent of trafficking cases is reported to the officials, both in cases of internal and cross-border trafficking. Some victims are discreetly receiving from private service providers help to overcome their trauma, such as counselling and shelter, without wanting to be identified as victims of trafficking or to turn to the authorities for help. Again, identification is hampered because sometimes the victims are not ready to share their experiences, especially with strangers and especially in cases in which they have suffered abuse or harm that is of a humiliating, dehumanizing or sexual nature, depending on their culture or moral background.

37. It is therefore pertinent to develop tools for identifying victims of trafficking. IOM, ILO, the United Nations Office on Drugs and Crime and some regional organizations have taken the lead in developing toolkits, training manuals and checklists[5] and utilizing them in the training of law enforcement officials, including labour inspectors and health and social service providers. The checklists provide objective and verifiable criteria and indicators that should be applied to help law enforcement officials and other stakeholders identify whether or not a person is a victim of trafficking.

38. In particular, the four sets of operational indicators of trafficking in human beings,[6] developed on the basis of the conclusions of a survey carried out by ILO and the European Commission in March 2009 enable identification of victims of trafficking: they refer to adults, children, sexual exploitation and labour exploitation cases. These indicators guide law enforcement officials in their efforts to identify victims and also provide clear parameters to statistics bureaux in producing national estimates on trafficking.

39. *The IOM Handbook on Direct Assistance for Victims of Trafficking*[6] outlines a methodology for the screening and identification of individuals seeking assistance as victims of trafficking. It contains a screening interview form which ensures that victims are asked all relevant questions, including how they moved or were moved

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[5] See, for example, United Nations Office on Drugs and Crime, Online toolkit to combat trafficking in persons (available at http://www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html); IOM, *The IOM Handbook on Direct Assistance for Victims of Trafficking*, 2007 (available at http://www.humantrafficking.org/uploads/publications/CT_20handbook_cover.pdf); United Nations Children's Fund, "Guidelines on the Protection of Child Victims of Trafficking", UNICEF Technical Notes, 2006 (available at http://www.unicef.org/russia/0610-Unicef_Victims_Guidelines_en.pdf); Office of the United Nations High Commissioner for Refugees, "Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked", 2006 (available at http://www.unhcr.org/443b626b2.html); and ILO, "Operational indicators of trafficking in human beings: results from a Delphi survey implemented by the ILO and the European Commission", March 2009 (available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publications/wcms_105023.pdf) and *Forced Labour and Human Trafficking: Handbook for Labour Inspectors*, 2008 (available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_097835.pdf). See also the Regional Policy on Protection and Assistance to Victims of Trafficking in Persons in West Africa, adopted by Ministers responsible for issues relating to trafficking in persons in countries members of the Economic Community of West African States at a meeting held in Accra on 3 April 2009.

[6] See footnote 5.

(through labour migration, recruitment, kidnapping etc.), what means were used to control them, details of the exploitation phase etc.

40. The Special Rapporteur finds these tools to be quite comprehensive and extensive in scope and excellent examples of red flags that could promote early detection, especially by trained personnel.

41. The use of such identification tools must be complemented by basic ethical principles in caring for and interviewing victims of trafficking, the most fundamental being not to harm or scare the victim, and to ensure his or her safety, privacy and confidentiality.

C. Protection

42. The Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1) and the Palermo Protocol provide some good standards for the protection of victims of human trafficking. Under the OHCHR guidelines, the protection of victims in the context of criminal proceedings on trafficking includes measures that ensure that the victims are not forced to testify, or that their continuing stay in the receiving State and their obtaining other assistance is not made contingent upon their willingness to testify. Further, there is the need to provide for a reasonable period of reflection for victims to decide whether or not to cooperate in criminal proceedings.[7] The OHCHR principles state that trafficked victims shall not be detained, charged or prosecuted for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons. On the other hand, under article 6 of the Palermo Protocol, there is a requirement for States to protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

Victim-witness protection in prosecution of trafficking cases

43. Since witnesses are invariably required to secure convictions in trafficking cases and the victims are almost always the principal witnesses in such cases, the need to protect them in the prosecution of trafficking offences becomes paramount. Although the prevalence of witness harassment or intimidation is difficult to quantify, witnesses are more likely to be willing to testify if they are assured of their personal safety and security and that of their families and, in general, protected from intimidation by the accused persons or their business associates, agents or partners in crime.

44. The nature of human trafficking as an offence is such that it is usually (though not always) committed by organized criminal groups, which obviously increases the likelihood of retaliation against the victim or his or her family members. The fear and threat of harm to themselves, their families and property remain effective psychological weapons of intimidation and control of victims by their traffickers. The purpose of witness intimidation is to dissuade the victim or witness from

[7] The Council of Europe Convention on Action against Trafficking in Human Beings, which entered into force in February 2008, requires State parties to provide for a reflection period of at least 30 days.

reporting a crime of trafficking or from cooperating with investigators or prosecutors, thereby effectively obstructing justice. Thus, the safety of witnesses, especially victims, must be given adequate attention by the criminal justice system of States. Specialized assistance is also required to deal with the trauma and associated problems faced by the victim-witness.

45. The services that should be provided as part of witness protection include but are not limited to secure and safe accommodation; relocation for reasons of safety, as may be necessary; security protection and escort to and from the court; conduct of trials in chambers; assistance in obtaining means of livelihood; free medical treatment; legal assistance and counselling services; travel expenses and subsistence allowance while acting as a witness; protection of the identity of a protected witness, thereby maintaining anonymity; and such change of identity as may be necessary for the protection of the witness and his or her immediate family members.

46. The Special Rapporteur is of the view that protection should not end when the trial process ends: victims should continue to receive post-trial monitoring and support in order to protect them from reprisal attacks by traffickers and their allies.

D. Assistance

47. A wide range of assistance can be provided to victims of trafficking, including: shelter in safe and secure accommodation; interpretation and language learning assistance; medical assistance; counselling; legal assistance; effective remedy, including compensation; family tracing; return and repatriation; reintegration in the country of origin; right to stay in the country of destination; educational, training and employment opportunities for livelihood sustainability so as to avoid the retrafficking of victims; and other follow-up and aftercare assistance with a view to their full rehabilitation and reintegration.

48. Article 6 of the Palermo Protocol deals with the provision of assistance to and protection of victims of trafficking in persons, and requires States parties to consider implementing measures to provide for the physical, psychological and social recovery of victims of such trafficking, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance;

(d) Employment, educational and training opportunities.

49. Paragraphs 4 and 5 of article 6 further require States parties, in applying the provisions of the article, to take into account the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care, and to endeavour to provide for the physical safety of victims of trafficking in persons while within their territory.

50. The Special Rapporteur wishes to reiterate the concern often raised with States on country visits and in other consultations, that assistance to victims of trafficking should be non-conditional and not based upon their willingness to cooperate with law enforcement or to participate in trials as witnesses. States should refrain from the practice of according conditional assistance to victims and rather build their trust in deciding on the course of action to pursue.

51. The Special Rapporteur considers it necessary to highlight and briefly examine some of the services required to effectively protect and provide assistance to victims of trafficking.

Sheltering

52. An adequate shelter to examine, identify and receive victims of trafficking in persons is crucial, even from the reception phase. Safe and secure accommodation is part of the necessary and inevitable direct assistance and protection that ought to be available for victims. When a victim feels safe and secure, he or she is more likely to share his or her story and cooperate with authorities. Sheltering is sometimes carried out by State agencies directly or in collaboration with the private sector, especially non-governmental organizations. Some States fund shelters that are run by non-state institutions. IOM also runs sheltering facilities in most countries in which it has a field presence, either in partnership with government or with non-governmental organizations.

53. There are very few shelters for male victims of trafficking. While on a country visit to Belarus, the Special Rapporteur found male victims in an IOM-funded shelter, however, the shelter had no separate facility to admit men and women simultaneously and had to alternate services to either women or men at any one point in time.

54. The Special Rapporteur recommends that the period of stay in shelter, while temporary, should be at least eight weeks and must be based on the needs of each individual, with the possibility of a longer stay of six months or more. The security of sheltered victims and of the shelter facility must be paramount. Shelter service providers must be in a position to conduct referrals for victims in need of medical, legal or other forms of assistance.

Counselling

55. Counselling is an essential aspect of psychosocial support; it is advisory in nature and aimed at rebuilding the self-esteem and self-assertion that will help the victim to deal with the trauma and, especially, psychological harm suffered in the course of being trafficked. It helps in building the trust and confidence that will enable victims to make an informed choice in regard to the variety of options and services available to them. Trained counsellors usually work with trafficked victims to get their stories straight and properly documented and to determine the services or assistance required by victims. It is part of the duty of counsellors to conduct risk assessment and advise on the suitability of returning the trafficked persons to their home countries and, in the case of children, on family reunification.

56. Counselling services are sometimes required for family members in order to enable the proper reintegration of victims into their families and communities. There are various stages of counselling: pre-identification and investigation counselling;

counselling during prosecution and use of shelter; and post-counselling for victims at the integration stage and also as part of follow-up and aftercare. Counselling is a continuous process and should be tailored in accordance with the circumstances and needs of victims. Counselling may be provided through hotlines or face-to-face encounters; whatever the case, privacy and confidentiality must be maintained.

Medical and health services

57. Trafficking victims are undoubtedly exposed to a number of health risks, including but not limited to sexually transmitted infections, HIV/AIDS, unwanted pregnancy and abortion-related complications, and other health-related problems, including emotional and sleep disturbances. Some victims have been forced by the traffickers to depend on substances and have become alcoholics or drug addicts.

58. The right to health care and access to health care are protected under several international and regional human rights instruments. The International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, inter alia, recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[8] Health-care services must meet the physical and mental needs of victims and must be offered in an atmosphere of respect, without stigmatization or discrimination. Mental health services should also be made available to victims through appropriate referrals; thus, law enforcement officials should be trained to understand the importance of health-care services for victims of trafficking.

Translation and language support

59. From the field experiences of the Special Rapporteur, translation and language support has been one of the most troubling and inadequately provided services, yet it is crucial in the rehabilitation and reintegration of victims and in their access to justice. Trafficked persons should be provided as of right with a competent, qualified translator and legal representation before and during all criminal, civil, administrative and other proceedings in which the trafficked person is a witness, complainant, defendant or other party. They must also be provided with free transcripts or copies in their own language of all documents and records related to any and such proceedings. Trafficked persons and defendants should have different translators and legal representatives. If the trafficked person cannot afford to pay, legal representation and translation should be provided without cost.[9]

60. There are several unacceptable situations in which even the sheltered victims have no means of communicating their day-to-day needs to the care providers and the others with whom they share the shelter facility. While the Special Rapporteur recognizes that the provision of language support on a daily basis may be daunting and resource-consuming, State actors and other stakeholders must endeavour to

[8] See International Covenant on Economic, Social and Cultural Rights, art. 12, Convention on Elimination of All Forms of Discrimination against Women, art. 12 and the Convention on the Rights of the Child, art. 24.

[9] Global Alliance Against Traffic in Women, Human Rights Standards (see sect. III, footnote 4), para. 10. See also International Covenant on Civil and Political Rights, art. 14, para. 3 and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 18, para. 3.

ensure that victims can express themselves in their own language in reporting their victimization and telling their stories during investigation and testimony in court. Consequently, it is important to provide counselling, hotlines and other assistance in a language that the victims of trafficking in persons can understand.[10]

Legal assistance

61. As provided in the Palermo Protocol, each State party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.[11]

62. Legal assistance and representation for victims, even in civil matters, are necessary for them to seek redress and obtain justice. In appropriate cases, each State party is required under its domestic laws to protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.[12]

Effective remedy

63. The right to effective remedy focuses on redress and access to justice that will ensure that the wrongs suffered by the victim are remedied, irrespective of his or her immigration status. This right is well established in international human rights law;[13] the criminal justice system must be able to prosecute and punish the traffickers while providing restorative justice to victims. Of course, compensation is part of the restorative justice that will go towards full social and economic rehabilitation of victims of trafficking in persons. Article 6, paragraph 6, of the Palermo Protocol states that "Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered".

Repatriation

64. Registration is an important aspect of integration. Before victims are returned, family tracing and contacts will have been established, a process that involves relevant governmental and non-governmental organizations in the home country of the victim of trafficking in persons. Obviously, if there are fears of persecution or other repercussions, victims should not be returned but rather granted the right to remain in the destination country. A growing number of countries are providing for that option in their national immigration laws. Return must comply with international and human rights standards for cases of cross-border trafficking, and must respect the dignity and rights of victims.

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[10] Palermo Protocol, art. 6, para. 3 (b).

[11] Ibid., para. 2.

[12] Ibid., para. 1.

[13] Universal Declaration of Human Rights, arts. 6, 7 and, in particular, 8; International Covenant on Civil and Political Rights, art. 2, in particular, and art. 14; and Convention on the Elimination of All Forms of Discrimination against Women, arts. 1, 2, 15 and 16.

65. The standards to be followed by States parties in cases of repatriation are well articulated in article 8, paragraph 2, of the Palermo Protocol, which stipulates, inter alia, that when a State party returns a victim of trafficking in persons to a State party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

Reintegration

66. Reintegrative activities are aimed at ensuring the overall social and economic recovery of the victim of trafficking. Necessary assistance and support should be provided for trafficked persons who want to return or have returned to their home country or community in order to minimize the problems they face in reintegrating into their communities. After return to the country of origin or normal residence, reintegration should start earnestly through partners in the country to support the returned, trafficked victim. Follow-up and aftercare are part of the reintegrative activities that must be pursued to avoid a situation in which victims are retrafficked.[14] Where a victim remains in the receiving country, rehabilitative efforts which include educational, training and employment opportunities should be made available to the victims.

67. In addition to the measures provided for under article 6 of the Palermo Protocol, paragraph 1 of article 7 stipulates that each State party should consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

E. Child-centred approach to children who are victims of trafficking

68. Trafficking of children is common in certain regions of the world, such as Asia, Africa and the Middle East. The experience of Non (see case 2 in sect. III.A above) illustrates the vulnerability of children to trafficking. Consequently, in recognizing that child victims of trafficking need special protective measures for their well-being, survival and development, the Special Rapporteur wishes to underscore the importance of recognizing and responding to the specific vulnerability of children to trafficking and the particular harm done to child victims. To that end, it is desirable that special guidelines be developed for the identification of children who are victims or potential victims of trafficking, whether accompanied or unaccompanied. Rehabilitation, reintegration and redress programmes and activities in that regard must be child-centred and in accordance with the concept of the best interests of the child[15] and the principle of non-discrimination.[16]

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[14] As suggested to the Special Rapporteur by the Foundation for Women, Bangkok, follow-up home visits should be done only with the consent of trafficked returnees as some may not want their family members and community to know what they have been involved in, in the destination countries, for fear of stigmatization.

[15] This concept is entrenched in article 3 of the Convention on the Rights of the Child.

[16] Ibid., art. 2.

69. States have the responsibility to identify children who are victims or potential victims of trafficking by systematically monitoring the well-being of children within their territory by means of a child protection system. Improved access to education for children who are at risk of being subjected to involuntary servitude or exploitation is central to reducing their vulnerability to trafficking. National legislation, including reform of penal or criminal codes, should be done to punish trafficking, sexual and physical violence against and labour exploitation of children at the national level.

70. Ireland has a good practice regarding the child victims: once a child is identified as a victim of trafficking, he or she is immediately referred to the social work team for separated children seeking asylum.[17]

71. It is also very important that, at the point of initial contact with victims, law enforcement officials be in a position to identify the child victim and provide him or her with the necessary information and assistance, including referrals to non-governmental organizations offering specialized services. Possible warning signs that a child might be a victim or potential victim of trafficking include but are not limited to where a child travels with an adult who is not a parent or guardian, is unaware of the final destination, or is unaccompanied. Where the age of victim is uncertain and it appears that the victim might be a child, the person should be treated as such until proven otherwise by further medical assessment and verification.

72. Once a child has been identified as a victim of trafficking, the measures of protection and assistance discussed in paragraphs 42 to 67 above shall be accorded to them.[18] Child victims of trafficking should, however, be dealt with in a manner appropriate to their overall well-being, having due consideration to the child's age, physical and mental immaturity and the desirability of promoting the child's reintegration. A child in such circumstances who, by virtue of being trafficked is temporarily or permanently deprived of his or her family environment, shall be entitled to special protection and assistance provided by the State.[19]

73. Protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up and, as appropriate, judicial involvement.[20] The identities of child victims should be protected even in judicial proceedings and they should be dealt with in a manner different from adult victims of trafficking and should never share a shelter facility with adult victims.

74. Intercountry adoption may be considered as an alternative means for the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;[21] where this is

[17] Child Care Act, 1991. Information provided by Ireland in response to the questionnaire circulated by the Special Rapporteur.

[18] See UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South-Eastern Europe, May 2003 (available from http://unicri.it/wwd/trafficking/bibliography/thb-bibl.php?au_=unicef).

[19] Convention on the Rights of the Child, art. 20.

[20] Convention on the Rights of the Child, art. 19, para. 2.

[21] Ibid., art. 21, subpara. (b).

the case, the best interests of the child shall be the paramount consideration.[22] However, according to the Committee on the Rights of the Child, adoption should not be considered where there is reasonable hope of successful tracing and family reunification.[23]

75. In affording proper treatment of unaccompanied or separated children, States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[24]

76. Importantly, States parties shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.[25]

F. Protection of and assistance to victims of trafficking, especially those in vulnerable situations

77. Article 14, paragraph 1, of the Palermo Protocol provides that nothing in the Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

78. The recommended principles on human rights and human trafficking[26] state that the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

79. Article 22 of the Convention on the Rights of the Child stipulates that State parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or

[22] Ibid., art. 21. Subparagraph (a) of the article requires that the adoption of a child be authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

[23] See the general comment of the Committee on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6), para. 91.

[24] Ibid., para. 26.

[25] Convention on the Rights of the Child, art. 39.

[26] The principles were developed by OHCHR in 2002 as a means of providing practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking.

domestic law and procedures, whether unaccompanied or accompanied, receives appropriate protection and humanitarian assistance.

80. It is very important to address the issue of trafficking of persons with a special vulnerability, such as refugees, asylum-seekers and stateless and internally displaced persons, in order to develop a more responsive framework. According to a report released in 2001 by ICRC, women and children make up 80 per cent of the population of refugee camps, prompting the conclusion that they flee because of their specific vulnerabilities, because they are targeted or because they fear attack.[27]

81. There is a responsibility to ensure that such categories of persons do not fall victim to trafficking and to ensure that the individuals among that group who have been trafficked or who fear trafficking have access to the asylum procedure. UNHCR deals with trafficking as it relates to such persons of concern and has developed activities specifically to prevent and respond to trafficking in such situations.[28]

82. There is encouraging evidence that some Governments have entertained and granted asylum based on a fear of trafficking.[29] It is necessary that trafficking victims or potential victims who may have a claim for refugee status obtain their right of residence in the receiving country. Interestingly, UNHCR has developed some guidance in that direction.[30]

83. As has been rightly observed in the context of refugee and displaced persons, there is little research on the number of trafficking victims who may be persons of concern to UNHCR. However, several studies have found that a growing number of refugees and internally displaced persons are at risk of trafficking.[31]

84. According to UNHCR, they often have few resources to provide for their needs and are vulnerable to the opportunities offered to them by traffickers. Many have lost the traditional family and community support networks that could potentially protect them from traffickers. Refugees are often forced to turn to criminal networks, including trafficking rings, to help them leave their homes as more and more countries adopt stricter visa and entry requirements. In addition, victims or potential victims of trafficking may have a claim to refugee status depending on the facts of their cases and UNHCR and several Governments have recognized such claims.[32]

85. The 2006 UNHCR guidelines on international protection relating to the refugee status of trafficking victims outline the personal characteristics, such as age,

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[27] See Charlotte Lindsey, *Women Facing War*, ICRC study on the impact of armed conflict on women (Geneva, 17 October 2001), p. 65. Available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0798.

[28] UNHCR Policy Development and Evaluation Service, "Review of UNHCR's efforts to prevent and respond to human trafficking" (PDES/2008/07), September 2008; available at http://www.unhcr.org/48eb2ff82.html.

[29] Ibid., p. 3.

[30] According to UNHCR guidelines addressing the issue of eligibility for refugee status of trafficking victims, the responsibility of UNHCR is to prevent persons of concern from falling victim to trafficking and to ensure that trafficking victims have access to asylum procedures and accompanying protections (UNHCR, Guidelines on International Protection No. 7; see sect. III, footnote 5).

[31] UNHCR Policy Development and Evaluation Service, "Review of UNHCR's efforts", para. 5.

[32] Ibid.

gender, appearance, physical strength, race, ethnicity, etc., that make certain persons more vulnerable to trafficking than others. It also highlights the situations in which such persons are at heightened risk of trafficking, for example, during conflict or when crossing international borders.[33]

86. UNHCR offices have provided training to stakeholders on the above-mentioned guidelines, explaining how victims or potential victims of trafficking can be eligible for refugee status.

87. Furthermore, the implementing partners of UNHCR have provided legal assistance and counselling to victims and potential victims seeking asylum on the basis of a fear of trafficking.[34]

88. ICRC is equally involved in the mapping of persons at risk and the identification of those who have already suffered harm in order to prevent trafficking and provide protection and assistance to those who have been trafficked.[35]

89. This important work of ICRC and UNHCR will help to ensure that refugees, asylum-seekers, stateless persons, internally displaced persons and returnees do not become victims of trafficking and that those persons who have fallen victim are quickly identified and offered the necessary protection and assistance, including but not limited to family reunification to avoid their being retrafficked.

IV. Conclusions and recommendations

90. **Although some very good work has been done by major stakeholders to combat trafficking by setting out criteria for identification (inter alia, ILO, IOM, United Nations Office on Drugs and Crime, United Nations Children's Fund (UNICEF), UNHCR, OHCHR, governmental organizations and non-governmental organizations), there is still ambiguity with regard to the criteria being used by many countries.**

91. **Perhaps what is more disturbing to the Special Rapporteur is that screening procedures often do not comply with the rights-based approach and sometimes woefully fail to respect the right of victims to privacy and confidentiality including voluntary agreement to cooperate with authorities in the investigation process. In some cases, victims are simply treated as criminals and are arrested and deported with no opportunity to be identified and provided with the necessary assistance as trafficked victims. Stories of the victims along with their identities often make news headlines, adding to the post-traumatic stress disorder of many victims.**

92. **Furthermore, when law enforcement officials carry out raids and rescue persons who have been forced or trafficked into prostitution, social assistance programmes for their rehabilitation and reintegration and a long-term strategy**

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[33] Ibid., para. 122.

[34] Ibid., para. 60.

[35] See Lindsey, *Women Facing War*, p. 35; and ICRC, Inter-agency Guiding Principles on Unaccompanied and Separated Children, 2004 (available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p1101/$File/ICRC_002_1011.PDF!Open).

for dealing with the root causes of trafficking should be in place. Case 1, discussed in section III.A of the present report, reinforces this point.

93. **Understanding the definition of trafficking and the important elements contained therein may prove fundamental for the proper identification of trafficked victims and for responding effectively to their situation. The definition of trafficking as encompassed in the Palermo Protocol underscores the fact that trafficking is a process that involves a number of interrelated actions rather than a single act at a given point in time.**

94. **The Special Rapporteur is concerned that victims of trafficking are sometimes deported without a sufficient period for recovery and reflection. The Special Rapporteur reiterates that victims should not summarily be deported. A proper repatriation process which takes into account the safety of victims must be followed. States should consider giving temporary or permanent residence permits to victims in accordance with their circumstances.**

95. **Trafficked persons should not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.**[36]

96. **The Special Rapporteur is concerned that the root causes of trafficking, namely, growing poverty, high youth unemployment, gender inequalities and the demand for cheap labour, are not being sufficiently addressed and trafficking continues to thrive as potential victims become more desperate to escape their unfavourable situations.**

97. **The current world economic crisis has further exacerbated the desperation and the quest for human security, survival and development. Trafficking for purposes of labour exploitation is likely to escalate, particularly during the current global economic crisis and in the light of increasing poverty caused by massive unemployment and the tendencies of employers to use cheap labour in order to cut costs and maximize profits. To tackle this, States should provide training, particularly for labour inspectors, that will improve understanding of the interface between migration and trafficking and enhance mechanisms for the identification of persons trafficked into exploitative labour and mixed migration situations.**

98. **Often, victims of trafficking in persons have suffered severe trauma of a physical, sexual or psychological nature and require an enabling environment and the specialized services provided by trained personnel to trust, feel safe to talk about their victimization to and assist law enforcement officials.**

99. **Administration of justice systems must be geared towards guaranteeing access to justice to victims, providing effective remedy, promoting respect for the fundamental human rights of victims, including offenders, and ensuring adequate protection and assistance to victims of trafficking in order to prevent revictimization and avoid the danger of being retrafficked.**

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[36] OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1), para. 7.

100. **In view of the foregoing, the Special Rapporteur recommends the following:**

(a) **States, in close collaboration with stakeholders, should develop comprehensive but specific operational guidelines, procedures and tools for identification based on existing models, particularly those developed by IOM, ILO, UNICEF, the United Nations Office on Drugs and Crime and UNHCR, which have experience in working with trafficked victims. Such guidelines and procedures should be widely disseminated;**

(b) **Legal frameworks for the protection of victims need to be strengthened. Where countries have ratified the Palermo Protocol, they should ensure domestic application through the national constitutional and legal framework. In addition, there should be legislation on the protection of witnesses and their families, and administrative measures and practices dealing with costs borne by witnesses;**

(c) **Law enforcement officials (police, immigration, including embassy staff, staff of health and social services, and labour inspectors) should be adequately trained in respect of the national and international legal and policy framework for identification and protection of and assistance to victims, with clear emphasis on respect for the human rights of victims of trafficking. Such capacity-building should be institutionalized through the provision of regular training and retraining that is human rights, child and gender sensitive;**

(d) **Direct assistance to victims of trafficking requires resources and where the government is not providing such services, it should fund the non-governmental organizations that provide them. Men should also be seen as victims of trafficking, with an equal right to protection and assistance;**

(e) **Referral mechanisms must be in place to refer victims and potential victims to governmental and non-governmental agencies for assistance that will promote the achievement of the three Rs (rehabilitation, reintegration and redress). For such referral systems to be effective, they must be well coordinated and based on collaborative work among governments, intergovernmental agencies, law enforcement agencies, international organizations and non-governmental organizations, among others;**

(f) **International cooperation is imperative for improving protection of and assistance to victims of trafficking. To that end, bilateral and regional guidelines and procedures should be developed by States to facilitate cooperation between Governments and stakeholders, including international organizations, in the identification and provision of direct assistance;**

(g) **Governments should raise awareness of their roles in prevention and protection activities to combat trafficking. Awareness-raising will undoubtedly reduce human trafficking and help to encourage victims who would otherwise have hidden or disappeared to come forward and seek redress for wrongs suffered; this would include the maintenance of hotlines;**

(h) **States are urged to ensure adequate psychosocial, medical and legal assistance to all victims of trafficking. Inappropriate shelters, for example, placing women victims of domestic violence with victims of trafficking in the**

same facility, or children with adults who are not their family members, is not a good practice in responding to the specific needs of victims of trafficking;

(i) States should adopt asylum-sensitive, anti-trafficking legislation to deal with cases of persons in especially vulnerable situations, such as refugees, asylum-seekers and stateless and internally displaced persons. In this regard, relevant training should be organized, especially for immigration and border control officers, lawyers and judges;

(j) States are urged to introduce victim-witness protection programmes and units within the national anti-trafficking framework as part of the institutional mechanism for effectively combating trafficking;

(k) States should ensure that procedures are in place for the rapid identification of child victims of trafficking and the provision of the necessary protection and assistance consistent with the best interests of the child. States must ensure that child victims of human trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons;

(l) States should provide non-conditional assistance to victims and build their trust so that they accept the State's offer of protection and assistance.